BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (T. 127-131) sought to be reviewed, was handed down on April 1, 1940. It is reported in 111 F. (2d) 140 (Advance Sheets No. 1, dated May 27, 1940). Petition for rehearing was filed (T. 132), and was denied on May 9, 1940 (T. 133).

II.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, (28 U. S. C. A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the circuit courts of appeals; and under paragraph 5 of Rule 38 of this Honorable Court. The basis upon which petitioner contends that this case is subject to review by certiorari under Rule 38, paragraph 5, is specified in detail in subdivision B of the petition for writ of certiorari (supra, pages 5-7), which is adopted for the purposes of this brief.

III.

STATEMENT OF THE CASE.

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit is set forth in the foregoing petition (subdivision A, pages 1-5), supra, which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS.

For the purpose of this brief, we adopt as Specifications of Error, the "Reasons Relied on for the Allowance of the Writ", set out in our Petition for Writ of Certiorari (pages 8-10, supra).

V.

ARGUMENT.

For the purpose of this brief, we will follow the points set out in subdivision D of the foregoing petition, under the heading "The Reasons Relied on for the Allowance of the Writ" (pages 8-10, supra), and will present our argument and authorities in support of each of these reasons as concisely as possible.

(1) The Circuit Court of Appeals erred in adopting a strict and technical interpretation of the Federal Rules of Civil Procedure.

We submit that certiorari should be granted in this case in order that all federal courts may understand the general principles which are to be approved by this Court

with relation to the interpretation of the Federal Rules of Civil Procedure.*

It requires little argument to demonstrate that—right or wrong— the Circuit Court of Appeals has adopted a strict construction of the provisions of Rule 59, and by implication, of Rules 7 and 8. That court has written into the language of each of these rules something which was not stated in the rule itself.

Rule 59 provides:

> "Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

The decision of the Circuit Court of Appeals expands this rule to provide also that, after ten days from the entry of judgment, the trial court is prohibited from setting aside a verdict which he cannot approve, and from granting a new trial on the ground that the court is dissatisfied with the verdict, notwithstanding the fact that the case is still pending before the court upon a motion for new trial, seasonably filed by the defeated party (T. 130-131).

Rule 59 (a) provides that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States". Rule 59 does not specify the form of the motion, but Rule 7 (b) (1) provides that any motion "shall state with particularity the grounds there-

* The provisions of the Federal Rules of Civil Procedure which are referred to in this brief are quoted in the Appendix (pages 43-45).

for, and shall set forth the relief or order sought". Rule 8 (e) (1) provides: "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required."

The Circuit Court of Appeals has interpreted these applicable rules to provide that a motion for new trial must not only state the grounds in a simple, concise and direct manner (see T. 42, 128), but must elaborate, discuss and apply each of the stated grounds to the particular evidence, instructions or other proceedings. In this case, although the grounds were separately stated, the court held: "The motion was inadequate and defective in essential respects and failed to meet recognized requirements for such a pleading". (Opinion, T. 130)

At this point we have touched only briefly the interpretation of these rules by the Circuit Court of Appeals, to demonstrate that the court went far beyond the language of the rules themselves, and thereby deprived petitioner of substantial rights gained by him through the granting of a new trial. At a later point in this brief we will discuss each of these points in more detail.

(a) Certiorari should be granted in order that this error may be corrected as soon as possible, before other federal courts follow this precedent and crystallize the tendency toward a technical interpretation of the rules.

It seems unnecessary to discuss the importance of the Federal Rules of Civil Procedure, and of their uniform application and the desirability of a thorough understanding of these rules by the bench and bar. Unless this decision is reviewed, it will be followed as a binding prece-

dent in the Tenth Circuit, and perhaps may influence the courts in other circuits toward a technical interpretation of the rules. A clear statement of general principles by this Court would eliminate the probability of much conflict, and would prevent much confusion at the present time.

The case was first tried in December, 1938 (T. 11), less than four months after the Federal Rules of Civil Procedure became effective, and there were no authoritative decisions available for the guidance of court and counsel. Counsel for petitioner and the trial court did not interpret the rules as strictly as did the appellate court. Otherwise, counsel might have prepared and filed a more elaborate motion, although hampered by the fact that a transcript of the proceedings at a trial cannot ordinarily be obtained within ten days. Likewise, the trial court, being in doubt as to the justice of the verdict, might have postponed other business of the court and re-examined the entire case within the ten-day period.

We believe this case comes clearly under the provisions of Rule No. 38, paragraph 5, of this Court, which indicates the character of reasons which will be considered in determining whether certiorari should be granted, particularly the following, which is quoted from paragraph 5 (b) of this rule:

> "Where a Circuit Court of Appeals *** has decided an important question of federal law which has not been, but should be, settled by this court;
>
> "or has decided a federal question in a way probably in conflict with applicable decisions of this court;

> "or has so far departed from the accepted and usual course of judicial proceedings *** as to call for an exercise of this court's power of supervision."

In subdivision B of our petition, (p. 5 supra) we have specified the reasons why we believe this case comes under each of the above provisions of paragraph 5 of Rule 38 of this Court, and the same is adopted as a part of this brief.

(b) Such interpretation is contrary to the purpose and intention of such rules.

We further submit, as a general principle, that this strict and technical interpretation of the Federal Rules of Civil Procedure is contrary to both the letter and the spirit of the rules themselves. It is unnecessary to review the progress of the movement to establish a uniform code of procedure in the federal courts, because the Court is thoroughly familiar with the entire history of this change in federal procedure. It cannot be questioned that all of the eminent lawyers and jurists who participated in this movement had a uniform purpose of simplifying, rather than complicating, federal procedure. The following statement of the Honorable William D. Mitchell, chairman of the Supreme Court Advisory Committee, at the Cleveland Institute, held by the American Bar Association in July, 1938, expresses the general purpose of the rules:

> "Now, as far as the general objectives of these rules are concerned, the first one, of course, was the union of procedure in law and equity, and that was quickly accomplished.

"The second objective was simplicity and flexibility, with not too much detail.

"We had to strike a fair balance between rules sufficiently definite to provide orderly procedure and yet avoid meticulous detail, and we hope we have reached that result."

(American Bar Association Journal, August, 1938, Vol. XXIV, page 675.)

In at least two other circuits, the circuit courts of appeal have recognized this purpose in the following decisions:

In *Crump v. Hill*, (C. C. A. 5th—1939), 104 F. (2d) 36, appellant failed to file notice of appeal within the prescribed time, but within such time he procured from appellee her written acknowledgment of service of notice of appeal and of designation of record on appeal and her entry of appearance. Rule 73 specifically provides that notice of appeal must be filed with the clerk. The court held that the appeal was good, and said in the opinion:

"It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights. ***

"We think that it was substantial compliance with the letter of Rule 73 to file, instead of the notice of appeal, the waiver of service thereof and appear-

ance thereto, but if this ruling does violate its letter, it certainly accords with and gives effect to its substance and spirit. Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks."

(104 F. (2d) 36, 38.)

In *Virginia-Carolina Tie & Wood Co. v. Dunbar*, (C. C. A. 4th—1939), 106 F. (2d) 383, referring to Rule 50 (a), which provides: "A motion for a directed verdict shall state the specific grounds therefor", the court said:

"We do not mean to say that technical precision need be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. *We doubtless have the power to consider such motion even though the grounds be not stated, if in our opinion this is necessary to prevent a miscarriage of justice;* but in ordinary cases, such as that which is here presented, the grounds of the motion must be stated to avail movant in this court."

(106 F. (2d) 383, 385.)

See also: *Stoltz v. United States*, (C. C. A. 9th—1938), 99 F. (2d) 283; *National Bondholders Corporation v. McClintic*, (C. C. A. 4th—1938), 99 F. (2d) 595.

The same liberality of construction has been followed by this Court in recent decisions relating to the Equity Rules.

In *Mumm v. Decker & Sons*, 301 U. S. 168, 81 L. Ed. 983, 57 S. Ct. Rep. 675, the Court said:

"The purpose of the Equity Rules was to simplify equity pleading and practice, and with respect to

> the former to dispense with prolix and redundant averments which had made equity pleading an outstanding example of unnecessary elaboration. The needed improvement in the interest of simplicity and conciseness made the test not what was time-honored in the verbiage of the past but what was essential to set forth the plaintiff's case. His statement was required to be 'short and simple'. The 'ultimate facts' which are to be stated are manifestly distinguished from evidentiary facts."
>
> (301 U. S. 168, 170.)

Also, in *Kelly v. United States*, 300 U. S. 50, 81 L. Ed. 507, 57 Sup. Ct. Rep. 335, this Court said in the opinion:

> "Manifestly the Equity Rules should be enforced with the strictness necessary to effectuate their essential purpose; orderly procedure so demands. But when, as here, there is mere omission of some step which has escaped the attention of both parties, and when rigorous enforcement without fair opportunity to correct the error would defeat hearing on the merits and entail unnecessary hardship, we think appropriate relief promptly asked for should be afforded."
>
> (300 U. S. 50, 54-55)

See, also, *Sprague v. Ticonic National Bank*, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777.

As a matter of interest upon this question, we also quote from an article entitled "Eight Months under the New Rules", by Walter L. Brown, Esq., published in The American Bar Association Journal, July, 1939, Vol. XXV, page 604:

> "In conclusion, it should be observed that no case has been found in which any substantial right of a litigant was prejudiced by the application of the new

> rules. There are a number of instances where lawyers have 'slipped up' through lack of familiarity with the rules but no harm to the interests of the client resulted in any instance. Demurrers have been construed as motions to dismiss under the rules, amendments have been allowed freely and the default provisions have not been enforced where a party has refused the more extensive discovery allowed under the new rules."

We therefore submit, as a general principle, that the new rules were intended to be liberally construed, without depriving any litigant of his substantial rights through a technical interpretation of any rule, and that for this reason the decision of the Circuit Court of Appeals is "probably in conflict with applicable decisions of this Court", as above stated.

(2) The Circuit Court of Appeals erred in the interpretation of the Federal Rules of Civil Procedure, and particularly Rule 59 thereof:

(a) In unduly restricting the power and discretion of the trial judge, while a motion for new trial is pending before him, to set aside a verdict which he cannot approve and to grant a new trial; contrary to the letter and the spirit of the rules, and restricting the form of trial by jury provided in the Seventh Amendment to the Constitution of the United States.

Passing to the specific questions which were determined by the Circuit Court of Appeals, we quote the following from the opinion of the court:

> "Stress is laid upon the point that a new trial was granted on the additional ground that the court was not satisfied with the verdict. But that was wholly ineffective for in that respect the court acted

on its own initiative, and Rule 59 (d), supra, limits the time within which a court may order a new trial on its own initiative to ten days from the entry of the judgment. That time had long since expired, and the seasonable serving of the motion did not operate to extend the time within which the court could act on its own initiative. It follows that at the time the order was entered the court was without power to order a new trial otherwise than on the motion." (T. 130-131)

The important function of the federal trial judge, in a trial by jury, has always been recognized in the federal courts. In *Capital Traction Company v. Hof,* 174 U. S. 1, 43 L. Ed. 873, 19 S. Ct. 580, the Court said in the opinion:

> " 'Trial by jury', in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, *and* (except on acquittal of a criminal charge) *to set aside their verdict if in his opinion it is against the law or the evidence.*"
>
> (174 U. S. 1, 13-14)

The broad power and discretion of the trial judge, to set aside a verdict which he cannot approve, has been recognized in numerous federal decisions, among which are the following:

Felton v. Spiro, (C. C. A. 6th), 78 F. 576, 581:

> "But the motion for new trial is a remedy accorded to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury. *** " (Citing *Mattox v. United States*, 146 U. S. 140, 13 S. Ct. 50, 36 L. Ed. 917)

McBride v. Neal, (C. C. A. 7th), 214 F. 966, 968:

> "But a motion for new trial is addressed to the discretion of the trial judge; and, in respect to the sufficiency of the evidence on disputed matters of fact, is addressed to him as the thirteenth juror."

Garrison v. United States, (C. C. A. 4th), 62 F. (2d) 41.

Najera v. Bombardieri, (C. C. A. 10th), 46 F. (2d) 281.

Neugen v. Associated Chautauqua Co., (C. C. A. 10th), 70 F. (2d) 605.

United States v. Flippence, (C. C. A. 10th), 72 F. (2d) 611.

Detroit Fire & Marine Insurance Co. v. Oklahoma Terminal Elevator Co., (C. C. A. 10th), 64 F. (2d) 671.

The decision in the case at bar holds that this power still exists, but only during the ten-day period following the entry of the judgment, notwithstanding the timely filing and pendency of a motion for new trial.

We submit that Rule 59 (d) applies only to a situation where neither party moves for a new trial, in which event the expiration of the ten-day period terminates the

time in which the trial court has jurisdiction of the case. Under former practice, this period was terminated by the adjournment of the term, if no motions were pending. But the timely filing of a motion for new trial undoubtedly operates to continue the jurisdiction of the trial court until the motion is disposed of, and there seems no reasonable ground for asserting that the broad supervisory power of the trial court is terminated at any time while he still has jurisdiction of the case.

The rule expressly limits the time within which "the court of its own initiative may *order* a new trial". This is quite another thing from the interpretation which limits the time within which the court may *grant* a new trial, upon a proper motion, to the defeated party. The use of the word "order" implies a situation where neither party is asking for a new trial, as also do the words "on initiative of court" and "of its own initiative". Without further belaboring this point, we submit that this only applies to a situation where neither party desires a new trial and the court finds it necessary to take the initiative.

Since the rule does not expressly restrict the power of the court to set aside a verdict he cannot approve, upon timely motion of the defeated party, this important power should not be restricted by implication.

When these rules were framed, it is presumed that recognition was given to the conditions under which federal courts work. In this district, and surely in most others, when a trial jury is called, the court is continuously occupied with the trial of jury cases for some

time, often for many weeks. As soon as one case is concluded, another is commenced, so that the jurors will be kept busy. Within ten days after the reception of a verdict the court usually has little time to study the cases which have been tried. After the jurors are dismissed, the court can consider motions for new trial and other matters which arose during the jury trials. During the trial of a jury case, the court may feel that the weight of the evidence is strongly on the side of the defeated party, and that an injustice has been done. In such case, a conscientious trial judge would certainly prefer to re-examine the evidence and hear further arguments of counsel before taking the responsibility of setting aside the verdict.

We submit that by the erroneous interpretation of this rule, the Circuit Court of Appeals has so departed from the approved and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and that the interpretation is erroneous.

(b) In holding that plaintiff's motion for new trial, in which the reasons therefor are stated in a simple, concise, and direct manner, as provided in Rule 8 (e) (1), "was inadequate and defective in essential respects and failed to meet recognized requirements for such pleading".

The motion for new trial stated the following grounds:

> "1. Newly discovered evidence which is material and which plaintiff and his counsel, with due diligence, were unable to produce at the trial. 2. Mistake and prejudice on the part of the jurors. 3. The court inadvertently failed to fully and properly in-

> struct the jury as to the law applicable in the case. 4. The verdict was secured by false testimony offered by the defendant." (T. 42, 128)

In the opinion of the Circuit Court of Appeals, after discussing this motion in some detail, the court said:

> "It is manifest that on clear considerations the motion was inadequate and defective in essential respects and failed to meet recognized requirements for such pleading." (Tr. 130)

We have already quoted the provisions of Rules 59 (a), 7 (b) (1) and (2), and 8 (e) (1), which bear upon the form of such a motion, under subdivision V (1) (a) of this brief (pp. 14-15). In this connection, we also call attention to the forms which are set out in the Appendix to the Rules, and referred to in Rule 84. None of these forms show the elaboration which the court apparently held to be necessary. Even the major pleadings, such as the complaint and the answer are condensed to the extreme limits of a general conclusion of fact, stated in the fewest possible words (see Forms 5, 6, 8, 9 and 12). This appendix does not contain a form for a motion for new trial, but does include forms for several other motions (Forms 19, 22, 23 and 24), in none of which are the grounds set out with any more particularity, considering the different types of motion, than in the motion for new trial which was filed by plaintiff (T. 42).

The court speaks of "recognized requirements for such pleading". There is nothing in the former practice, either state or federal, which requires that in a motion

for new trial, the pleader should amplify the specified grounds. The Kansas practice in state courts has always been to set out, in the language of the statute, as many of the statutory grounds as are relied on. (G. S. Kansas, Sec. 60-3001, 60-3003.) Recognized textbooks upon federal practice, before the new rules, contain suggested forms for such motions, which only state the grounds without amplification. (See Marker, Federal Appellate Jurisdiction and Procedure, Sec. 3, pp. 3-4; Hughes Federal Practice, Vol. 14, Sec. 13228 to 13236, pp. 387 to 392.)

We therefore submit that if the requirements for a motion for new trial include any more than a separate statement of the grounds, this requirement was not recognized prior to the adoption of the new rules; and the rules were intended to simplify, and not elaborate, the forms of pleadings and motions.

It would unduly lengthen this brief to repeat in detail the argument which was made before the trial court in support of this motion, which persuaded the trial court to grant a new trial upon these grounds. However, we will briefly state the points upon which this argument and the ruling of the court were based.

The case involved a complicated question of master and servant. The alleged servant, De Camp, was the regular employee of one Henry Kerbs who operated a small garage at the rear of defendant's store (T. 12-13). Under a special arrangement with the defendant, De Camp was often called upon to mount tires and perform other work for the defendant, and plaintiff was injured

as a result of his alleged negligence in such work (T. 14). Kerbs testified that in such work defendant's manager (Smitherman) had the direction and control over De Camp (T. 12), and there was other evidence to the same effect (T. 13), and the evidence of Smitherman partially contradicted this testimony (T. 22-23).

The case was unusual in the further respect that the employee, De Camp, not only denied the alleged negligence on his part but also denied that he was even present when plaintiff was injured (T. 26-27). Since plaintiff had testified that De Camp was present (T. 14-15), there was not only an oridnary conflict in the testimony about the details of the accident, but an apparent perjury on the part of either the plaintiff or De Camp as to whether the latter was present.

Notwithstanding these difficult questions of fact and law, the case was tried in a single day (T. 11-40, 40-41).

Since there were no special interrogatories, it was impossible to tell whether the jury had accepted De Camp's testimony that he was not present, or whether its verdict was based upon a finding that he was not the servant of the defendant.

Upon the motion for new trial, plaintiff urged that the testimony that De Camp was not present was false; that the court had not fully instructed the jury on the issue of master and servant; and that this had led the jury into a mistaken view of the facts of the case and the law applicable thereto, coupled with some prejudice against the plaintiff which was created by this false testimony.

All of this was addressed to the discretion of the court. The plaintiff could not have appealed from an adverse ruling on the motion. But the court was convinced that the jury had been misled by the false testimony and incomplete instructions, and it was therefore his duty to grant a new trial. Since the court had heard the evidence and had had the opportunity of observing the witnesses, there was no occasion for plaintiff to have secured affidavits from the same witnesses to show that defendant's testimony was false nor to have quoted the instructions, which were already a part of the record, as supporting evidence for the motion.

It is well established that the trial court has the power and duty to grant a new trial under these conditions:

Garrison v. United States, (C. C. A. 4th), 62 F. (2d) 41:

> "He may, however, set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, *or based upon evidence which is false;* for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice. See *Felton v. Spiro*, (C. C. A. 6th), 78 F 576." (62 F. (2d) 41, 42)

Roedegir v. Phillips, (C. C. A. 4th), 85 F. (2d) 995, 996:

> "The trial judge was not without discretion to set aside the verdict and order a new trial merely because the evidence on the first trial was conflicting. He had seen the witnesses and had had opportunity to judge of their credibility; and, if he was convinced that the verdict was against the weight of the evidence or that, for any other reason, it would

result in a miscarriage of justice, it was his duty to set it aside and order a new trial."

Woodward v. Atlantic Coast Line R. R., (C. C. A. 5th), 57 F. (2d) 1019.

The Circuit Court of Appeals mentions the fact that no objection was made to the instructions (T. 130). This would ordinarily prevent the plaintiff from securing an appellate review of errors in the instructions, but does not prevent the trial court from sustaining a motion for new trial upon this ground.

Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58:

> "A trial court may, in the exercise of its judicial discretion, grant a new trial, if convinced that its charge was wrong, even though its attention was not called to the error complained of before the case was finally submitted to the jury."

Sulzbacher v. Continental Casualty Co., (C. C. A. 8th), 88 F. (2d) 122, 124:

> "One of the purposes of a motion for new trial is to call to the court's attention errors that may have been committed during the trial, whether those errors be such as have been discovered since the trial, or were committed in opposition to the moving party's contentions asserted at the trial. In other words, the motion may not only be made on the ground of newly discovered evidence, but upon newly discovered law; in fact, the trial court may, during the term at which the judgment was rendered, on its own motion, set aside its judgment and grant a new trial."

Paine v. St. Paul Union Stockyards Co., (C. C. A. 8th), 35 F. (2d) 624.

Norton v. City Bank & Trust Co., (C. C. A. 4th) 294 F. 839.

In the instructions at the first trial (T. 31-40), the terms "master" and "servant" are not defined, as they were in the second trial (T. 91-92), and the court predicated liability upon the actual exercise of control rather than the right to control (T. 36). The instruction upon the same subject at the second trial (T. 91-92) corrects these errors and defines the terms used in accordance with the authoritative Kansas cases upon the subject (*Baker v. Petroleum Co.*, 111 Kan. 555, 207 Pac. 789; *Dobson v. Baxter Chat Co.*, 148 Kan 750, 85 P. (2d) 1; *Hurla v. Capper Publications*, 149 Kan. 369, 87 P. (2d) 552).

In such a case as this, tried in one day, it is naturally difficult for a jury to grasp the legal principles from which it must determine the issue of master and servant, and it might easily have been misled by the court's failure to define these terms and to explain the distinction between the right of control and the actual exercise of such control.

Since the trial court believed the jury had been misled by inaccurate and incomplete instructions as well as false testimony, the court certainly had the power to grant a new trial on these grounds.

(3) The Circuit Court of Appeals erred in holding that it is an abuse of discretion for a trial court to grant a new trial when he believes the verdict has been procured by false testimony, upon incomplete instructions, and by mistake and prejudice upon the part of the jurors, upon timely motion specifying such grounds.

After discussing the various grounds of the motion for new trial, the Circuit Court of Appeals said in the opinion:

> "The granting of it exceeded the exercise of sound judicial discretion; it constituted an abuse of discretion." (T. 130)

Of the cases cited in the opinion (T. 129), only the case of *Pettingill v. Fuller,* (C. C. A. 2d), 107 F. (2d) 933, is an authority on the abuse of discretion. There the trial court granted a new trial because of alleged misconduct of counsel. The misconduct consisted of an offer of proof of certain evidence, which the trial court held was inadmissible. The appellate court held the evidence was admissible, and that the things said in argument over its admissibility were not misconduct on the part of counsel. The appellate court said that the only ground really urged for depriving the defendant of his verdict was misconduct of counsel, and since this point was not well taken, it was an abuse of discretion to grant a new trial. The court said in the opinion:

> "Here we are reviewing an interlocutory order after final judgment in the action. An attempt to review an order setting aside a verdict has rarely been made under such circumstances; *indeed never within our knowledge.* That such an order may be reviewed on an appeal from a final judgment is un-

doubted unless the exercise of judicial discretion involved in making it is beyond the correcting hand of a court of appeal, no matter how arbitrary it was. We think that Justice Brandeis in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 485, 53 S. Ct. 252, 77 L. Ed. 439, evidently regarded such orders as reviewable."

(107 F. (2d) 933, 936)

What the Court said in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, supra, at page 485, is:

"It is urged that the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable. The Court of Appeals has not declared that the trial judge abused his discretion. Clearly the mere refusal to grant a new trial where nominal damages were awarded is not an abuse of discretion. This Court has frequently refrained from disturbing the trial court's approval of an award of damages which seemed excessive or inadequate, and the circuit courts of appeals have generally followed a similar polity. *Whether refusal to set aside a verdict for failure to award substantial damages may ever be reviewed on the ground that the trial judge abused his discretion, we have no occasion to determine.*"

In *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, supra, the Court also said (p. 481), that neither the Supreme Court nor the Circuit Court could review the action of a federal trial court in granting or denying a motion for new trial "*for error of fact*". We have shown that the decision in *Pettingill v. Fuller*, 107 F. (2d) 933, supra, was based upon an error of law—not of fact, and the abuse of discretion was grounded upon such error of law.

But in this case the trial court found that the verdict was procured by false testimony, and by mistake and prejudice on the part of the jurors. This constituted the judgment of the court on matters of fact. It was based upon what the court saw and heard at the trial—from which he believed there was a miscarriage of justice. Had he no discretion to determine these matters? Could the appellate court, upon the same record, say it was an abuse of discretion for him to set aside such a verdict, simply because the evidence was conflicting?

Many other cases might be cited in support of the universal rule that the granting of a new trial is within the discretion of the court.

Farrell v. First National Bank, (C. C. A. 3rd), 254 F. 801:

> "The grant of a new trial is one of the most useful discretionary powers of a trial court. It is not often exercised by the experienced District Judges of this circuit, and when done it is only, as they conceive, in furtherance of the due administration of justice. In no case in this circuit has it been held that a writ of error will lie to such grant of a new trial by the trial judge. Such step is only taken with reluctance, but when it is done there is every presumption that it was done in pursuance of a wise discretion, and in furtherance of justice, as the trial judge conceives."
>
> (254 F. 801-802)

Railway Co. v. Heck, 102 U. S. 120, 26 L Ed. 58.

Carter Coal Co. v. Nelson, (C. C. A. 4th), 91 F. (2d) 651, 654.

Neugen v. Associated Chautauqua Co., (C. C. A. 10th), 70 F. (2d) 605, 606.

The latest expression of this Court is in *United States v. Socony-Vacuum Oil Co.*, — U. S. —, decided May 6, 1940, L. Ed. Advance Opinions, Vol. 84-No. 14, page 760, 60 S. Ct. (Advance Sheets No. 13) 811, where the Court said:

> "Hence, this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court."

From these authorities it may well be doubted whether a federal appellate court ever has the authority to review the ruling of a trial court, granting a new trial, on the ground of abuse of discretion. But assuming that such power exists, the abuse of discretion certainly must affirmatively appear from the record.

The following is quoted from Bowers on Judicial Discretion of Trial Courts, page 33, section 18:

> "As a natural sequence of the foregoing principle, it follows that, as it must be affirmatively shown that the court abused a discretion abiding in it to do or not to do the particular act complained of, the burden of so showing rests upon the party complaining. The reason usually advanced for the declaration and application of this rule is that the trial tribunal has superior advantages for knowing the exigencies of the case under which the order attacked has been made, has seen the parties, observed the witnesses, followed the minutia of the trial as it developed, and can know better than an appellate

court what will and what will not further the cause of justice in the case before it."

The same principle is stated in the opinion in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 485, 77 L. Ed. 439, 53 S. Ct. 252, as follows:

> "The record before us does not contain any explanation by the trial court of the refusal to grant a new trial, or any interpretation by it of the jury's verdict. In the absence of such expressions by the trial court in the case at bar, the refusal to grant a new trial cannot be held erroneous as a matter of law. Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. Compare *Union P. R. Co. v. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 755, 38 S. Ct. 318; *Dunn v. United States*, 284 U. S. 390, 394, 76 L. Ed. 356, 359, 52 S. Ct. 189, 80 A. L. R. 161."

In the case at bar the record contains no affirmative showing that the trial court abused its discretion. Upon the printed record the evidence of the various witnesses presents sharp conflicts which we have already discussed. The trial court who saw the witnesses believed that a part of defendant's evidence was false, and that the verdict was procured by such false testimony. There is nothing in the record to indicate in the slightest degree that the trial court did not act in good faith in coming to this conclusion. Could the Circuit Court of Appeals, after reading the printed record, reverse the case because it did not reach the same conclusion? It had none of the opportunities to observe the witnesses and their demeanor on the witness stand, as did the trial

court. Without any affirmative showing of an abuse of discretion, to say that the appellate court may reverse such a case, is to say that the trial court has no discretion to set aside a verdict which he believes to have been procured by false testimony. Such a ruling would destroy the important supervisory power of a federal trial judge who presides over a jury trial.

In the many authorities concerning the discretion of a trial court in disposing of a motion for new trial, it has frequently been said that the granting *or denial* of a motion for new trial was discretionary with the court, and this general statement has sometimes been qualified by excepting cases where there was an abuse of discretion. There might be an abuse of discretion in denying a motion for new trial, where the litigant is barred from any further opportunity to be heard. A different situation is presented where a new trial is granted.

The Circuit Court of Appeals of the Tenth Circuit, in the recent case of *Hunt v. United States*, 53 F. (2d) 333, upheld the grant of a new trial, and in the opinion, written by Judge Phillips (who did not sit in the case at bar), the court said:

> "The cause now stands in the District Court with the issues undisposed of, as if it had never been tried."

We submit that this statement by Judge Phillips is correct, and that it follows that neither party can complain when a new trial is granted because each party thereafter has his day in court and a full opportunity

to be heard upon the issues in the case. To set aside the judgment rendered at a second trial, without finding any error therein, and to reinstate the first verdict which the trial court could not approve, is certainly an unwarranted exercise of power by the appellate court.

We submit that since the record showed no abuse of discretion, the Circuit Court of Appeals had no basis for reversing the case on the ground that the trial court abused its discretion in granting a new trial.

(4) The Circuit Court of Appeals erred in holding that an affidavit setting out newly discovered evidence, filed more than ten days after the verdict, cannot be considered in support of a motion for new trial, which specified newly discovered evidence as one of the grounds (the motion having been filed within the ten-day period and the affidavit later), where there is no prejudice to the substantial rights of the parties by the delay in filing the affidavit.

Reverting to the first ground of the motion for new trial, "Newly discovered evidence which is material and which plaintiff and his counsel, with due diligence, were unable to produce at the trial", the Court of Appeals held that the affidavit of Robert Bannerman could not be considered for the reason that no extension of time was obtained within which to file such motion and the affidavit was not filed with the motion but after the expiration of the ten-day period (T. 129). This presents a nice question of the interpretation of the Federal Rules of Civil Procedure, which we will discuss only briefly because we believe the other grounds of the motion, together with the fact that the court was dissatisfied with

the verdict, furnished ample justification for the granting of the new trial, regardless of this point.

It is true that Rule 59 (b) provides that a motion for new trial on the ground of newly discovered evidence may be made after the expiration of the ten-day period only with leave of court obtained on notice and hearing and on a showing of due diligence.

It is also true that Rule 59 (c) provides that when a motion for new trial is based upon affidavits, they shall be served with the motion.

Therefore, to come within the strict letter of the rules, plaintiff should have asked leave of the court to refile the motion, insofar as it pertained to newly discovered evidence, together with the affidavit, and given notice for a hearing thereon.

Actually, plaintiff presented the affidavit at the time of the hearing upon the motion for new trial, and the same was received and considered by the court without any formal objection being placed in the record by counsel for defendant, and without any request being made by counsel for defendant for additional time to meet this affidavit or to file opposing affidavits.

In the absence of such objection, we submit that under Rule 46 of the Federal Rules of Civil Procedure, any irregularity or error in the filing of this affidavit after the ten-day period, was waived and could not be properly considered by the Circuit Court of Appeals.

We also submit that any error in the admission of such affidavit was harmless and should have been disre-

garded under the provisions of Rule 61. Since defendant made no effort to attack this affidavit nor to file affidavits in opposition thereto, nor claimed any surprise nor asked for any continuance in order to meet this affidavit, it is clear that the substantial rights of the defendant were not affected by its consideration by the court.

Cudahy Packing Co. v. City of Omaha, (C. C. A. 8th), 24 F. (2d) 3, citing *Bronson v. Schulten,* 104 U. S. 410, 415, 26 L. Ed. 797.

The affidavit of Robert Bannerman (T. 43) was material in the case because it tended to contradict defendant's contention that plaintiff returned to defendant's store after the employee De Camp had left (T. 26). Without going into detail upon this point, the Bannerman affidavit accounted for plaintiff's movements during a part of the afternoon and was consistent with plaintiff's testimony as to the time he was at defendant's store (T. 14). Counsel for plaintiff were necessarily surprised by defendant's contention that De Camp was not present when plaintiff was injured, as this was not pleaded in the answer (T. 8-10). Since the trial was held in Kansas City, Kansas, and occupied a single day, counsel for plaintiff had no opportunity to secure additional evidence as to plaintiff's whereabouts at different times on the afternoon in question, until after the conclusion of the trial.

The trial court considered that this newly discovered evidence was material and a sufficient ground for new trial.

CONCLUSION.

The scope and interpretation of the Federal Rules of Civil Procedure present questions of intense interest to every federal court and every lawyer who practices before them. So great is this interest that several new legal publications have been established for the sole purpose of promptly reporting all judicial interpretations of these rules, and the American Bar Association Journal, for over a year, carried a monthly department devoted to "Decisions on the Federal Rules of Civil Procedure". Up to this time, most of the reported decisions are from district courts, with a few cases decided by the Circuit Courts of Appeals, of which the case at bar is the first in the Tenth Circuit.

This case presents a number of questions upon the interpretation of specific rules, and also involves the broad principle whether these rules are to be interpreted so strictly and technically as to deprive the unwitting litigant of his substantial rights.

We respectfully submit that a writ of certiorari should be granted in this case, not only because plaintiff has lost his recovery through a misapplication of the rules, but because this erroneous interpretation of the rules

should be corrected as soon as possible for the benefit of litigants in future cases.

Respectfully submitted,

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